

1
2
3
4
5
6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

9 A.C., a minor by and through his guardian,
MARIA CARBAJAL,

10 Plaintiff,

11 v.

12 NINTENDO OF AMERICA, INC.,

13 Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

14
15
16
17
18
19
20
21
22
23
CLASS ACTION COMPLAINT

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

CLASS ACTION COMPLAINT

Plaintiff A.C., a minor, by and through his guardian, Maria Carbajal, individually, and on behalf of all others similarly situated, by and through counsel, brings this action against Defendant Nintendo of America, Inc. (“Nintendo”). Plaintiff’s allegations herein are based upon personal knowledge and belief as to his own acts and upon the investigation of his counsel and information and belief as to all other matters.

INTRODUCTION

1. This is a class action lawsuit brought against Nintendo by Plaintiff on behalf of himself and similarly situated minor consumers who purchased Nintendo Switch game systems, including the original Nintendo Switch, the Switch V2, the Nintendo Switch Lite, as well as the standalone Joy-Con controllers (collectively referred to herein as “Switch”).

2. The Switch is manufactured, marketed, and sold by Nintendo. The initial Switch was first made available for purchase in the United States on March 3, 2017. Prior to that date, on January 13, 2017, Nintendo hosted a Launch Event, the video of which is widely available on YouTube (the “Launch Event”).¹ Several Nintendo executives touted the durability and features of the Joy-Con controllers at the Launch Event. For example, Reggie Fils-Amie, the President and COO of Nintendo of America, described them as “amazing controllers [that] combine all the gameplay innovations that Nintendo invented, and adds to it.”² Yoshiaki Koizumi, the Nintendo Switch General Producer, remarked that “each joy-con can be used as a fully-functioning, individual controller.”³

¹ <https://www.youtube.com/watch?v=JsiRY521Nis> (last visited Nov. 17, 2020).

² *Id.* at 59:40.

³ *Id.* at 13:28.

3. Contrary to these claims, however, the Switch is defective. Specifically, the Joy-Con joystick controllers that are used to operate the Switch contain a defect that results in characters or gameplay moving on the screen without user command or manual operation of the joystick (“Drifting” or the “Drift Defect”). This defect significantly interferes with gameplay and thus compromises the Switch and Joy-Con controller’s core functionality.

4. Based on analysis conducted by Plaintiff’s counsel and their technical expert to date, it appears that a principal cause of the Drift Defect is extensive wear on the pad surface on the interior of the Joy-Con. As the steel brushes inside of the joystick move back and forth, they rub away the soft carbon material that makes up the pad, which changes its electrical resistance and leads to the drifting phenomenon. The difference in surface hardness between the steel brush and the carbon pad results in excessive wear debris that collects on the steel brush tips. This transferred debris exacerbates the wear of the pad. The wear on the carbon (a known soft material) by the steel brushes (a known hard material) inevitably causes the joysticks to fail.

5. Nintendo is—and at all relevant times has been—aware of the Drift Defect through online consumer complaints, complaints made by consumers directly to it, and through its own pre-release testing. In addition to the now thousands of online complaints, there has been significant negative publicity surrounding the Drift Defect in the gaming community.⁴

⁴ See, e.g., *3 Years Later, Joy-Con Drift is Still a Huge Problem*, IGN (May 11, 2020), available at: <https://www.ign.com/articles/3-years-later-joy-con-drift-is-still-a-huge-problem> (calling the Switch the “least durable hardware Nintendo has made” and “an unmitigated disaster”); *Our readers find Nintendo’s Joy-Con controllers a crushing disappointment*, ENGADGET (June 5, 2020), available at: <https://www.engadget.com/nintendo-switch-joy-con-controllers-user-reviews-150033437.html> (noting that drift “makes some games impossible to play” and that many users experience drift issues “even after their units were supposedly fixed” by Nintendo); *Switch owner with engineering background discovers Joy-Con drift design flaw*, NINTENDO ENTHUSIAST (Apr. 5, 2019), available at: <https://www.nintendoenthusiast.com/switch-owner-with-engineering-background-discovers-joy-con-drift-design-flaw/>) (explaining that the Joy-Con drift issue is likely “due to Nintendo’s apparent poor choice of parts”).

6. The Drift Defect has garnered international scrutiny as well, and is reportedly the subject of active investigations by consumer advocacy groups in France, Belgium and Switzerland.⁵ Most recently, in France, consumer group, UFC Que-Choisir, filed a complaint with the Public Prosecutor of Nanterre in late September 2020, citing premature wear of printed circuits and a sealing defect which causes a worrying amount of debris and dust within the joystick to be the probably origins of the drift failures.⁶

7. The rampant public backlash recently prompted Nintendo's president, Shuntaro Furukawa, to apologize publicly for "any trouble caused to [Nintendo's] customers" related to the defective Joy-Con, noting that Nintendo is "continuing to aim to improve" its products.⁷

8. Notwithstanding its knowledge of the Defect, Nintendo has failed to disclose this material information to consumers, and routinely refuses to repair the joysticks without charge

⁵ See, e.g., *Nintendo Switch, Stop obsolescence of controllers*, QUE CHOISIR (May 11, 2019), available at: <https://www.quechoisir.org/action-ufc-que-choisir-nintendo-switch-stop-a-l-obsolescence-des-manettes-n72531/> (UFC-Que Choisir concludes that the "manufacturing defect" in Nintendo's Joy-Cons is "aimed at deliberately reducing the life of the product to increase the replacement rate" and constitutes "planned obsolescence"); *Belgium Consumer Group Demands Nintendo Repair All Joy-Cons for Free, Issues Two Year Warranty*, NICHEGAMER (Feb. 24, 2020), available at: <https://nichegamer.com/2020/02/24/belgium-consumer-group-demands-nintendo-repair-all-joy-cons-for-free-issues-two-year-warranty/> (Belgian consumer organization Testankoop demanded Nintendo repair all Joy-Cons for free and honor a two year warranty and identifying drift as a "manufacturing defect"); *Joy-Con: Nintendo "lenient" with complaints*, FEDERATION ROMANDE DES CONSOMMATEURS LE POUVOIR D'AGIR (May 27, 2020), available at: <https://www.frc.ch/obsolescence-des-manettes-qui-nen-font-qua-leur-tete/> (discussing Joy-Con drift and criticizing the two-year warranty extension, stating that Nintendo should "act upstream on the design rather than to remedy the default").

⁶ See *Nintendo Switch: UFC-Que Choisir denounces the planned obsolescence of Joy-con controllers*, QUE CHOISIR (Sept. 22, 2020), available at: <https://www.quechoisir.org/nos-combats-switch-nintendo-l-ufc-que-choisir-denonce-l-obsolescence-programmee-des-manettes-joy-cons-n72823/>.

⁷ See *Nintendo president apologizes for Joy-Con drift*, Polygon (June 30, 2020), available at: <https://www.polygon.com/2020/6/30/21308085/joy-con-drift-apology-nintendo-president?fbclid=IwAR1RfWNFeFT-IUBW7rH70BqD-pLGWLo24pjF6bAK3VvQ5u1bqLamqvWWjRY>

1 when the Drift Defect manifests. Furthermore, when it does attempt to repair (or replace) the
2 Joy-Cons, it has been unable to successfully eliminate the defect or prevent it from re-
3 manifesting.

4 9. Making matters worse, in September 2019, Nintendo released the new handheld
5 version of the Switch—the Switch Lite—which has non-removable joysticks and controllers that
6 also appear to include the same joystick hardware as the regular Switch. The Switch Lite also is
7 reportedly plagued by drifting per a growing number of online complaints. Nintendo knew about
8 the Drifting Defect and the issues with its controller and joystick hardware, yet decided to
9 incorporate them into the Switch Lite without first fixing the issue.

10 10. As a result of Nintendo's unfair, deceptive, and/or fraudulent business practices,
11 owners of Switches and Joy-Con controllers, including Plaintiff, have suffered an ascertainable
12 loss, injury in fact, and otherwise have been harmed by Nintendo's conduct.

13 11. Accordingly, Plaintiff brings this action to redress Nintendo's violations of state
14 consumer fraud statutes and unjust enrichment. Plaintiff seeks monetary relief for damages
15 suffered, declaratory relief, and public injunctive relief.

16 **JURISDICTION AND VENUE**

17 12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C.
18 § 1332 of the Class Action Fairness Act of 2005 because: (i) there are 100 or more class members,
19 (ii) there is an aggregate amount in controversy exceeding \$5,000,000, exclusive of interest and
20 costs, and (iii) there is minimal diversity because at least one plaintiff and one defendant are
21 citizens of different states. This Court also has supplemental jurisdiction over the state law claims
22 pursuant to 28 U.S.C. § 1367.
23

1 18. Approximately three months after purchasing the first console, A.C.'s pair of Joy-
2 Cons began exhibiting drift issues, causing in-game movement without his input. A.C. reached
3 out to Nintendo Support to get a Joy-Con repair or replacement. Since the controller, which came
4 with the system, was still under the one-year warranty, Nintendo did not charge anything for this
5 repair.

6 19. After several more months of normal use, the repaired pair starting drifting as well.
7 By this point, the controllers were outside the warranty period, so A.C. had to pay \$40 using his
8 own money to have the controllers repaired by Nintendo. The repaired controllers began
9 exhibiting drift after A.C. received them back from Nintendo a second time.

10 20. In or around May 2018, A.C. bought a pair of standalone Joy-Con controllers from
11 GameStop, again using his own money. These controllers also began exhibiting drift issues after
12 approximately three months of normal use. A.C. reached out to GameStop directly and received
13 a replacement set of controllers. The replacement set of controllers from GameStop also began
14 drifting after a few months of regular gameplay.

15 21. On April 28, 2020, A.C. purchased the second version of the Nintendo Switch
16 Console (V2) for \$299.99 from Amazon using his own money. After approximately five months
17 of normal use, the Joy-Con controllers that came with this console also began to exhibit the Drift
18 Defect. A.C. sent the Switch Joy-Cons into Nintendo under Nintendo's new repair program
19 launched in late July 2019 to address issues specifically with Joy-Con Drift. Nintendo repaired
20 his set of Joy-Con controllers. A.C. was without the use of his Joy-Cons for six weeks between
21 the time that he sent the controller to Nintendo in September 2020 to the time he received the
22 purportedly repaired controller back in October 2020.

22. None of Nintendo's repair efforts proved successful. Each of the three Joy-Cons A.C. owned exhibited drifting even after the controllers had been purportedly repaired or replaced by Nintendo.

23. Exhausted by the lack of any real repair, in or around October 9, 2019, A.C. ended up purchasing and exclusively using a Nintendo Pro Controller for gameplay because his Joy-Cons continued to exhibit drifting which rendered them obsolete for normal gameplay. He purchased the Pro controller from eBay with his own money.

24. To the extent Nintendo alleges that A.C. consented to the terms of an End User Licensing Agreement ("EULA") purportedly related to the use of the defective Joy-Con controllers, A.C. disaffirms any such EULA, including any arbitration provision contained therein, and has completely ceased use of the defective Joy-Con controllers.

Defendant

25. Defendant Nintendo of America, Inc. is incorporated in Washington State and maintains its principal place of business at 4600 150th Ave, NE, Redmond, WA 98052.

FACTUAL ALLEGATIONS

A. Switch Console/Joy Cons

26. The Switch is a video gaming system and console that was initially released by Nintendo in March 2017. It is a hybrid console: gamers can attach the removable Joy-Cons and play the Switch as a portable handheld gaming system (similar to the popular Game Boy or Game Gear) or they can dock the Switch in a docking station and play the Switch on a television screen like a traditional gaming console (e.g., PlayStation or Xbox).

1 27. The Joy-Con controllers are wireless—gamers use a right a left Joy-Con, which
2 can either be connected to the Switch screen for portable handheld play, connected to a traditional
3 gaming controller accessory, or used as two separate controllers for two player gameplay. The
4 Joy-Con controllers and the different ways they can be used are depicted in these images⁸:



12 The joysticks are marked with arrows.



8 <https://www.nintendo.com/switch/system/> (last visited Nov. 17, 2020).



28. The Joy-Cons each contain a joystick and several buttons that are used to control gameplay.

29. Nintendo heavily advertised the versatility and quality of the Joy-Cons for gameplay as a main selling point of the Switch system. For example, at the livestreamed launch event (which Plaintiff watched), Nintendo made the following representations about the Joy-Cons⁹:

“Nintendo Switch has inherited DNA from the many Nintendo’s entertainment systems Nintendo has released to date;”

“Nintendo Switch has been designed as a home entertainment gaming console that gives you the freedom to change your play style;”

“Handing a joy-con to a friend or family member, sharing the joy right then and there;”

“Each joy-con has an analog stick, and each stick can be pressed like a button;”

“Each joy-con can be used as a fully-functioning, independent controller;”

“You can hand the Joy-Con to the person next to you in many two-player games, we call this sharing the joy;”

⁹ <https://www.youtube.com/watch?v=JsiRY521Nis> (last visited Nov. 17, 2020).

1 “When you play with these Joy-Con, they fit right in the palm of your hand just
2 right, feel very natural;”

3 “Those amazing controllers, the Joy-Con, combine all gameplay innovations that
4 Nintendo invented, and adds to it.”

5 30. A new Switch retails for approximately \$299.99 and includes one Joy-Con
6 controller set (left and right, as depicted above).

7 31. Additional Joy-Cons can be purchased for approximately \$79.99 for a pair or
8 approximately \$49.99 for an individual left or right controller.

9 32. The Joy-Con controllers are defective. Specifically, the joysticks on the Joy-Cons
10 suffer from a defect that results in the joystick “drifting” on its own. This affects gameplay such
11 that the characters or action on the screen move as if there has been some movement of the
12 joystick by a gamer, even though there has not.

13 33. Drifting significantly interferes with gameplay. Since the entire purpose of the
14 Switch is to play video games and the purpose of the Joy-Con specifically is to control the
15 gameplay in those video games, the Drift Defect affects the device’s central functionality.

16 34. Nintendo released an updated version of the Switch, or the Switch V2, in August
17 2019. The Switch V2 also suffered from the Drift Defect.

18 35. On September 20, 2019, Nintendo introduced the Switch Lite, which is Nintendo’s
19 smaller, purely handheld version of the Switch console.

20 36. One of the most notable differences between the regular Switch and the Switch
21 Lite is that the Switch Lite does not have removable Joy-Cons. Instead, the controllers and
22 joysticks are built right into the Switch handheld gaming system.

23 37. Despite having knowledge of the Drift Defect for over two years, Nintendo did not
resolve the joystick and drifting issues prior to launching its handheld Switch Lite system.

1 38. Early reports and teardowns indicated that the Switch Lite is plagued by defective
2 control and joystick systems.¹⁰

3 39. This was confirmed by the experiences of consumers who complained of
4 experiencing the exact same drifting issues on the Switch Lite soon after purchase.

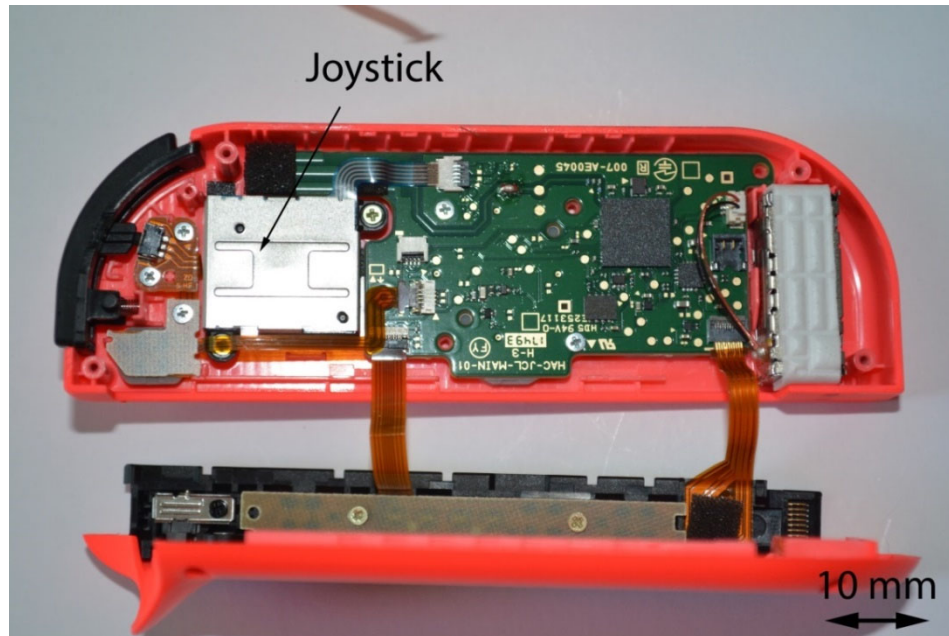
5 40. This is particularly problematic for purchasers of the Switch Lite because unlike
6 with the regular Switch, there is no ability to simply remove the Joy-Cons from the Switch Lite
7 console—the controllers are built into the gaming system. When the Switch Lite’s joysticks fail,
8 the whole system fails.

9 41. Nintendo knew of the joystick and control issues with the regular Switch and Joy-
10 Cons, yet it did not resolve this issue and included the same defective hardware into the Switch
11 Lite systems.

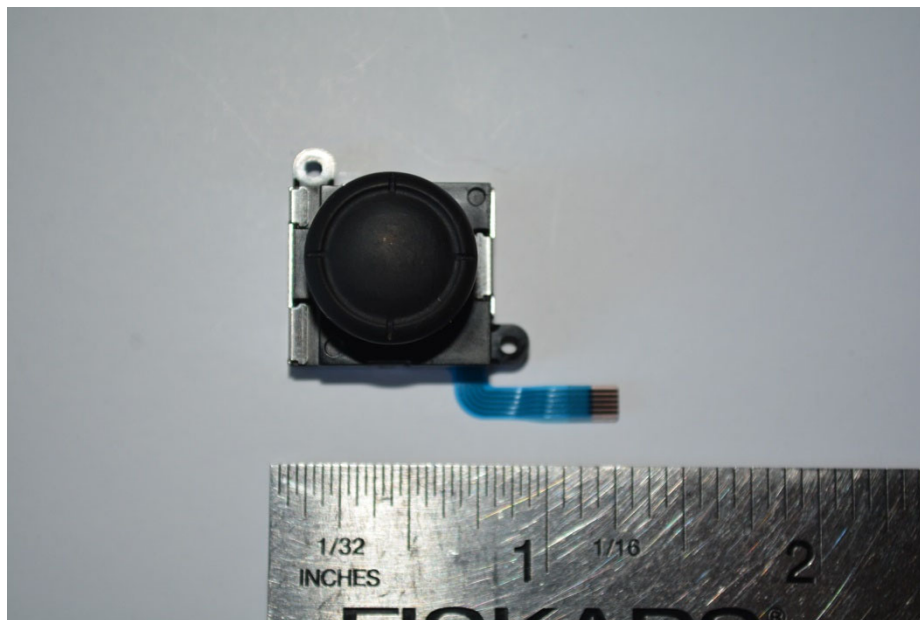
12 **B. Technical Nature of the Defect**

13 42. The design of and selection of materials in the joystick are the cause of the Drift
14 Defect. The picture below shows the inside of the Joy-Con case. The silver metal square contains
15 the mechanism for controlling the joystick:

16
17
18
19
20
21
22
23 ¹⁰ See <https://gizmodo.com/new-videos-suggest-the-nintendo-switch-lite-might-have-1838363969> (last accessed Nov. 17, 2020).

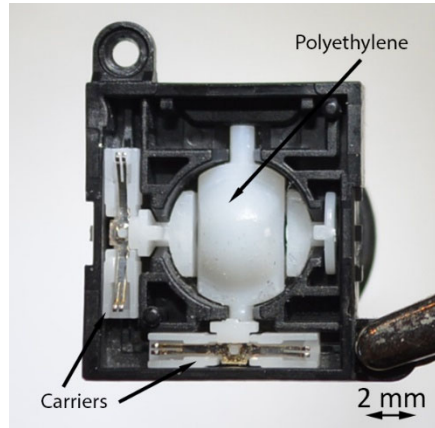


The picture below shows the actual joystick and the metal case containing its interior mechanism:

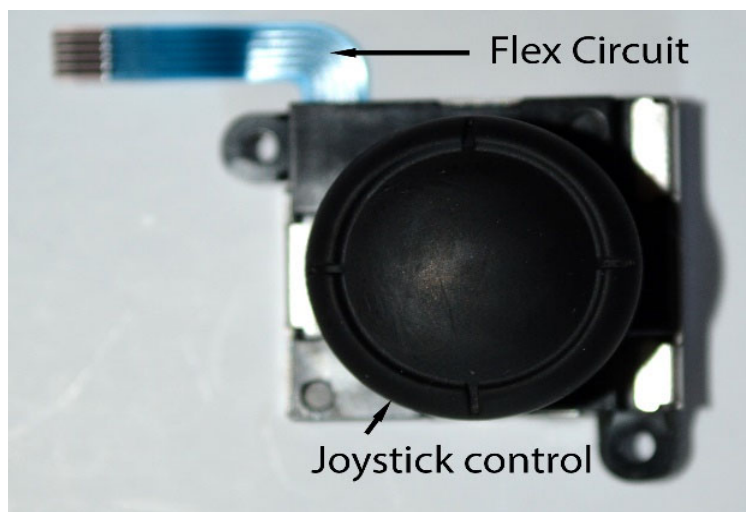


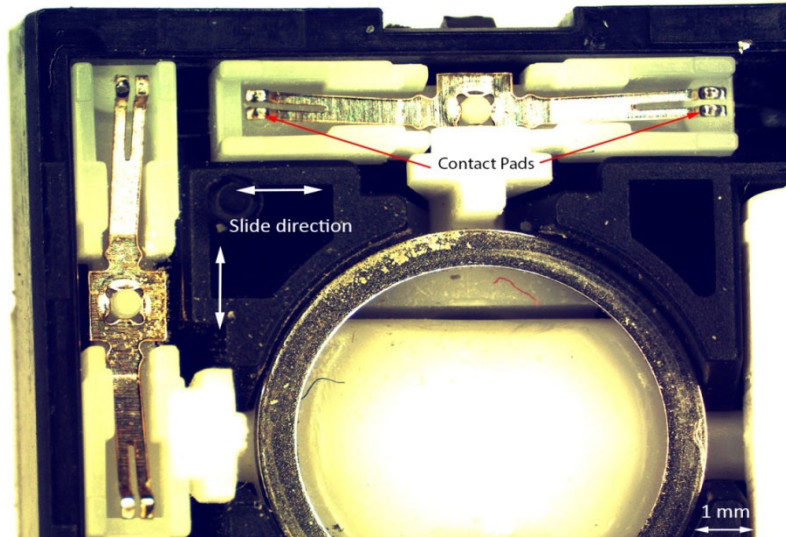
43. When the metal case is opened up, the base of the joystick mechanism contains two sets of brushes that move in the x and y direction, depending upon input from the user. Movements of the joystick are translated through polyethylene components to the brushes. The brushes are made of coated steel and are mounted in a polyethylene carrier. A diagram of the

1 exposed undercarriage of the joystick is below:

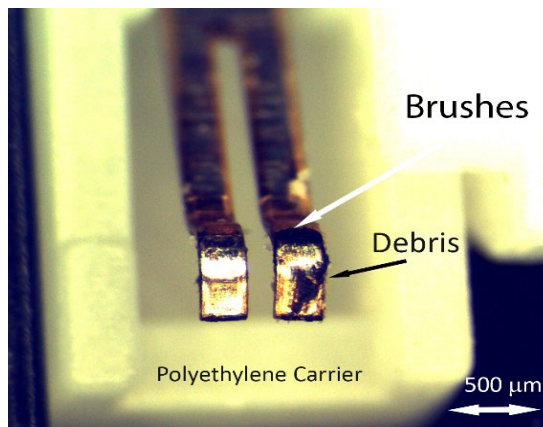


9 44. The brushes make direct contact with a conductive pad which lies on a flexible
 10 circuit. The flexible circuit is a conductive path made of metal on a polymer that transmits signals
 11 (i.e., the motion of the brushes) to the motherboard about the physical location and movement of
 12 the joystick. The brushes travel over the pad which translates to changes in the electrical signals
 13 that control movement on the playing screen. The flexible circuit, contact pads, and brushes are
 14 depicted below:

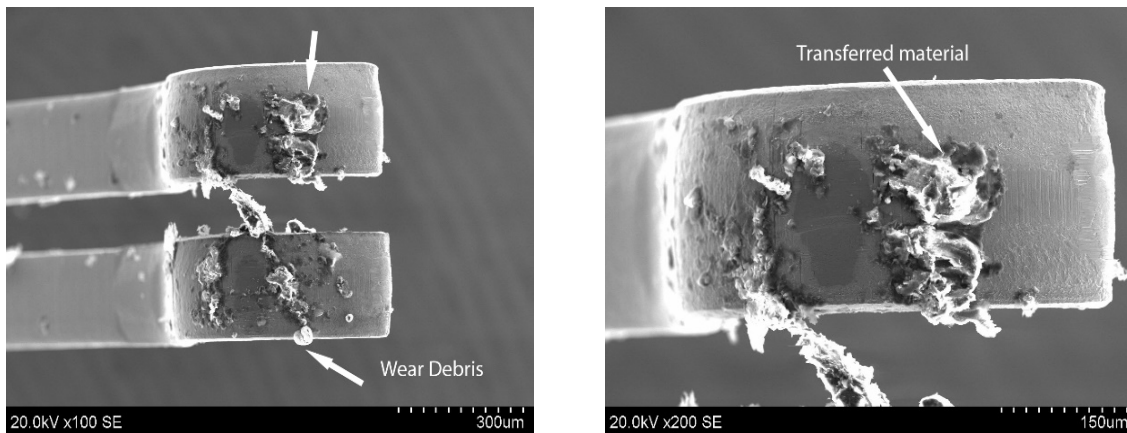




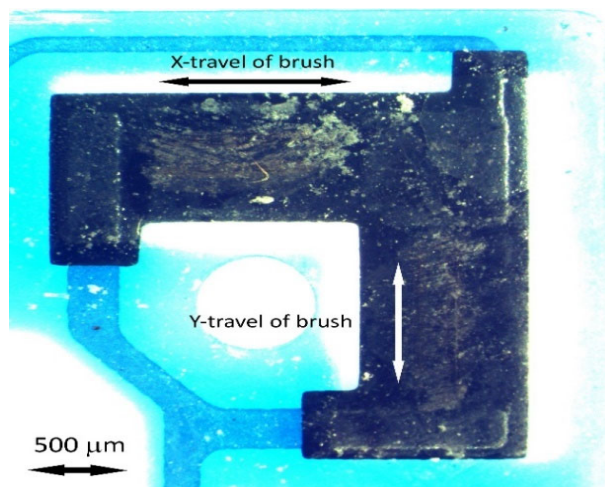
45. Based on analysis conducted by Plaintiff's counsel and their expert to date, it appears that a principal cause of the drifting failure is extensive wear on the pad surface. As the steel brushes move back and forth they rub away the soft carbon material that makes up the pad. The removed material changes the electrical resistance of the pads and potentially leads to drifting. The difference in surface hardness between the steel brush and the carbon pad leads to excessive wear debris that collects on the brush tips. This transferred debris exacerbates the wear of the pad. Also, during normal motion of the joystick the soft polyethylene parts create wear debris as they articulate against one another. These particles end up on the pad and act as an abrasive, causing further wear.



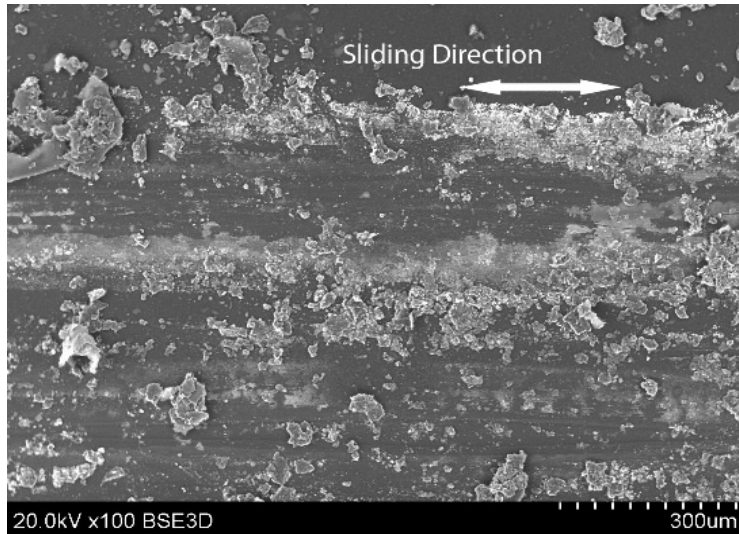
46. The pictures below, taken on a scanning electron microscope, illustrate the debris from the flexible circuit that accumulate on the brushes from normal use of the Joy-Cons:



47. Examination of controllers that are exhibiting significant drifting showed transferred wear debris on the brush tips. All of the flexible circuits had wear patterns on the pads. The entire range of motion of the joystick only allows the brush tips a few millimeters of travel. Hence, the wear pattern on the pads is correspondingly small. Besides the wear of the carbon material, significant amounts of polyethylene were also present on the brushes. The sliding direction is left to right and this image illustrates the significant amounts of wear debris present.



The following picture shows an up-close view of the wear marks on the flexible circuit:



C. Customer Complaints

48. Plaintiff's experiences with the drifting phenomenon are by no means isolated or outlying occurrences. Indeed, the internet is replete with examples of message boards and other websites where consumers have complained of the exact same Joy-Con defect.

49. Many consumers report experiencing drift on multiple Joy-Con controllers, including replacement controllers they purchased separately from their Switches.

50. Scores of Switch owners have publicly complained about the Joy-Con Defect and drift. The following are some of the complaints submitted on forums and social media websites by Switch owners (which upon information and belief are monitored by Nintendo). Below is just a sampling of the many complaints.¹¹

¹¹ The following complaints are reproduced as they appear online. Any typographical errors are attributable to the original author. All bold emphasis added.

Complaints about the original Switch system

Daniel328DT, Nintendo Support Forums, 11/17/17¹²

“I’m currently having problems with the left joycon analog stick. Whenever I power on my left joycon, **the controller starts moving up even when I’m not touching the analog stick . . .**”

Kingtata10, Reddit, 6/11/18¹³

“[M]y original pair of Joy-Cons started drifting about a year after buying it at launch. I have 2 year warranty, **so I went and replaced them.** 3 months later and it **started happening again . . .**”

CanyonWrn, Reddit, 7/28/18¹⁴

“I have been one of the unlucky individuals who has experienced **excessive, long-term drift issues with all of my pairs of joy-cons.** I own three pairs between two consoles. **I have had to send joy-cons in for repair due to drifting *eight* times—sometimes, obviously, multiple times per joy-con . . .**”

Stelter6, GameFAQs Message Board, 12/2/18¹⁵

“**[I] have two left joycons and the analog stick drifts on both of them.** One drifts left and the other drifts up. Basically input registers without me touching the stick. This happens attached and unattached. I’m not sure if it’s my Switch or the joycons.”

truthfullycorncob, Reddit, 12/4/18¹⁶

“**[I] have two sets** that are a year and a half old and are **both starting to drift bad . . .**”

¹² <https://en-americas-support.nintendo.com/app/social/questions/detail/qid/70928/~/-left-joycon-analog-stick-drifting-upwards> (last visited Nov. 17, 2020).

¹³ https://www.reddit.com/r/NintendoSwitch/comments/8qbp78/left_joycon_analog_stick_drifting/ (last visited Nov. 17, 2020).

¹⁴ https://www.reddit.com/r/NintendoSwitch/comments/92pht5/we_really_shouldnt_discount_people_experiencing/ (last visited Nov. 17, 2020).

¹⁵ <https://gamefaqs.gamespot.com/boards/189706-nintendo-switch/77262127> (last visited Nov. 17, 2020).

¹⁶ https://www.reddit.com/r/NintendoSwitch/comments/a30tm4/joy_cons_drifting/ (last visited Nov. 17, 2020).

1 Josh, Stack Exchange, 1/13/19¹⁷

2 “About 2 weeks ago I noticed that the left analog stick on my Nintendo Switch Joy-
3 Cons started "drifting", that is, without touching the stick (when it was centered) it
4 would register as off-center causing characters in games to start randomly walking
rather difficult”

5 CyberSai, IGN Boards, 3/14/19¹⁸

6 “My left joycon has a **drifting control stick that constantly makes my character**
7 **move in any game when I'm trying to stand still, or when I try to move in**
8 **another direction it feels like a struggle.** Obviously this is making playing a lot of
games unplayable, and I don't feel like buying all new joycons for \$60. How do you
repair it on your own without sending it into Nintendo?”

9 Lizuka, Nintendo Life, 3/15/19¹⁹

10 “**Both of mine** have been drifting for a loooong time now. The right only slightly so
11 for the longest time while the left got flat out unusable... **then I bought a**
replacement and now the right is rapidly getting just as bad”

12 Chef Brah, Reddit, 3/26/19²⁰

13 “**Every friend of mine and me have had drift issue with joycons.** I just use pro
14 controller now.”

15 drewc406, Reddit, 4/3/19²¹

16 “[I] bought my Switch about 18 months ago . . . [I] **noticed both sets of my joy cons**
17 **begin giving me problems with drift on the left controller a couple months ago,**
and so I started to pay attention to all the complaints. It’s alarming that this is a known
18 issue on an \$80 controller, and yet Nintendo hasn’t said boo about it . . . [A]re we
expected to throw away expensive controllers and just buy new ones, or pay

19 ¹⁷ <https://gaming.stackexchange.com/questions/344972/why-are-the-analog-sticks-on-my-nintendo-switch-controllers-all-starting-to-drif/345047> (last visited Nov. 17, 2020).

20 ¹⁸ <https://www.ign.com/boards/threads/how-to-fix-drifting-control-stick-in-left-joycon.455340618/> (last visited Nov. 17, 2020).

21 ¹⁹ <http://www.nintendolife.com/news/2019/07/guide-how-to-fix-a-drifting-nintendo-switch-joy-con-analogue-stick> (last visited Nov. 17, 2020).

22 ²⁰ <https://www.reddit.com/r/NintendoSwitch/comments/b5z81z/how-to-fix-controller-drift-on-the-switch-joycons/> (last visited Nov. 17, 2020).

23 ²¹ <https://www.reddit.com/r/NintendoSwitch/comments/b972b2/the-left-joycon-failure-is-a-travesty-that-should/> (last visited Nov. 17, 2020).

1 Nintendo to fix their mistakes?”

2 “How have these controllers not been recalled? It’s obviously a design flaw, so why
3 not fix it? I am going to try and fix them myself, which I’ve seen work, but the fact
4 that we have to try to do that is ridiculous . . . **[I] can’t push down anymore, and
5 that the drift has gotten so bad that even in the menu everything just goes
6 straight to the top . . .**”

7 Lucky777, GameFAQs, 4/8/19²²

8 “[T]he switch will be my last nintendo console thanks to joycon drift . . . never have
9 [I] seen such poorly designed controllers . . . **[I] will have to buy my 4th pair of
10 joycons soon[.]** [T]hose will end up drifting too[,] they always do . . .”

11 ikonino, Reddit, 5/18/19²³

12 “My right joy-con is drifting hard and its a nightmare, any tips for fixing it?”

13 Razzy, Nintendo Life, 6/20/19²⁴

14 “**Four of my five** joycons developed drifting problems, one only a month after
15 purchase . . .”

16 imoctopusman, Reddit, 7/14/19²⁵

17 “**I have 8 joy cons and only 2 left ones don’t drift.** It’s ridiculous. Had to buy a pro
18 controller because of it.”

19 **Complaints about the Switch Lite**

20 From BokuNoBeard, on 9/22/19²⁶

21 “@SpawnWaveMedia so I think I may have the first case of joycon drift in a Switch
22 Lite and all I've done is marathoned Link's Awakening. I love this console so much
23 but this is bumming me out. Is this how joycon drift manifests? Or is this another
24 (less worrying) isolated defect?”

25 ²² <https://gamefaqs.gamespot.com/boards/189706-nintendo-switch/77626229> (last visited Nov. 17, 2020).

26 ²³ https://www.reddit.com/r/NintendoSwitch/comments/bq9tq6/my_right_joycon_is_drifting_ha
rd and its a/ (last visited Nov. 17, 2020).

²⁴ http://www.nintendolife.com/news/2019/07/guide_how_to_fix_a_drifting_nintendo_switch_j
oy-con_analogue_stick (last visited Nov. 17, 2020).

²⁵ https://www.reddit.com/r/NintendoSwitch/comments/cczxwz/i_know_its_been_said_a_billio
n_times_but_nintendo/?utm_source=share&utm_medium=ios_app (last visited Nov. 17, 2020).

²⁶ <https://twitter.com/BokuNoBeard/status/1175701784419061761> (last visited Nov. 17, 2020).

1 From Alexis Javier, on 9/22/19²⁷

2 “2 days after buying the switch lite the analog stick are already drifting slight when
3 i move my joystick to the left.”

4 From Savvy, on 9/23/19²⁸

5 “@NintendoAmerica just got switch lite and it has joycon drift after 2 days. I don’t
6 want to exchange and set up a whole new one again to discover the same problem.
7 So frustrating. And I know many people haven’t experienced it, but it exists
8 everywhere.”

9 From HelloCello519, on 9/24/19²⁹

10 “I beat Link’s Awakening over the weekend on my original Switch Lite system, I
11 had only put like 20 something hours on it, and it started to show joy-con drift. Why
12 is this happening earlier on than with the earlier Switch? Anyone know? Thankfully
13 my old gamestop manager hooked me up with a new one.”

14 From HighFive214, on September 24, 2019³⁰

15 “I can’t believe it, my Nintendo Switch Lite is already drifting. I was playing BOTW
16 and the camera kept moving without touching the analogue stick. I tried to calibrate
17 and update the controllers but it was still the same. Luckily I already have an OG
18 Switch to fall back on but I’m so gutted and upset. I’m going to get my money back
19 first thing tomorrow and wait until Christmas to see if Nintendo fixes the issues.”

20 **D. Knowledge**

21 51. Nintendo is aware of the Joy-Con Defect. In the first place, Nintendo controls the
22 manufacture, development, marketing, sales, and support for the Switch and Joy-Con controllers.
23 Accordingly, Nintendo was responsible for performing pre-release testing on the Switch and Joy-

24 ²⁷ <https://www.youtube.com/watch?v=d2hglXSO7Co> (last visited Nov. 17, 2020).

25 ²⁸ <https://twitter.com/SavvyZer0/status/1176333184272744448> (last visited Nov. 17, 2020).

26 ²⁹ https://www.reddit.com/r/Switch/comments/d8rn7i/i_beat_links_awakening_over_the_weekend_on_my/ (last visited Nov. 17, 2020).

27 ³⁰ https://www.reddit.com/r/Switch/comments/d8bnf4/nintendo_switch_lite_drifting_on_botw/ (last visited Nov. 17, 2020).

1 Con controllers which should have alerted it to the defect.

2 52. Further, Nintendo has received droves of complaints about this issue both directly
3 from consumers and through online forums and social media sites that it monitors. Nintendo's
4 own President has publicly acknowledged and apologized for the Drift Defect, yet Nintendo has
5 done nothing to modify the materials or design of the Joy-Cons or otherwise respond to or correct
6 the Defect.

7 53. It has been reported that, as of March 31, 2020, there have been 55.77 million
8 Switch units sold worldwide (not even counting additional Joy-Cons purchased separately).³¹
9 Clearly, Nintendo would not be selling a product with such volume without first conducting
10 extensive presale tests (such as failure analysis, stress tests, pressure tests, and friction tests)
11 before bring the Switch to market.

12 54. As already noted, Nintendo touted the Joy-Con's design as a product of many years
13 of Nintendo innovations at the launch event for the Switch.

14 55. The Switch was first released in March 2017 and is still on the market today.

15 56. Despite knowing about the Joy-Con defect, Nintendo continues to market and sell
16 the Switch and Joy-Con controllers (through third-party retailers) without disclosing the defect.

17 57. Recently, Nintendo announced the release of the Joy-Cons in several new colors
18 such as purple and orange. There is no indication that Nintendo redesigned or fixed the defect in
19 the Joy-Cons while it was coming up with these new color options.

20 58. Nintendo also just launched a new version of the traditional Switch (version 2, not
21 to be confused with the Switch Lite) which has an extended battery life. Early reports and tear
22

23 ³¹ https://www.nintendo.co.jp/ir/en/finance/historical_data/index.html (last accessed Nov. 17, 2020).

1 downs conducted by bloggers indicate that nothing has changed with respect to the design of the
 2 defective Joy-Cons.³²

3 59. Purchasers of the new version of the Switch are starting to post online complaints
 4 about experiencing the same drift issues:

5 From Josh Gilbert, on 9/11/19³³

6 “Nothing annoys me more than getting the v2 and my first set of joycons get the
 7 drifting issue.”

8 From Thomas Bourne, approximately August or September 2019³⁴

9 “the c3 has not fixed joycon drift it happens to me” (referring to the model number
 of the newer Joy-Cons)

10 From Air Wrecked, approximately August or September 2019³⁵

11 “I’ve bought the switch v2 about 3 weeks ago and the joy cons have the new updated
 12 c3 labeling on them and the right one started drifting only 2 weeks into it”

13 From Dark Diamond, approximately August or September 2019³⁶

14 “I have drift on the old and c3 model But I fixed it on a video on my channel And
 15 they still work” TimeLag Gaming replied: “Oh well that’s good! Too bad to hear that
 even the newer ones drift though”

16 From Joshua Mark, approximately August or September 2019³⁷

17 “Sadly, I have a C3 neon pink joy-con that has started drifting. I am annoyed as I got
 18 the neon set to replace my original joy-cons after one of them started drifting! (that
 was a C0 joy-con) So yeah it looks like they haven't fixed it. I am also surprised at

19 ³² See <https://www.youtube.com/watch?v=pepvQKh6O60> (last visited Nov. 17, 2020);
 20 <https://www.ifixit.com/News/we-tore-down-the-new-nintendo-switch-whats-different> (last
 visited Nov. 17, 2020).

21 ³³ <https://www.facebook.com/groups/thenintendoswitch/permalink/2473675816031010/> (last
 visited Nov. 17, 2020).

22 ³⁴ <https://www.youtube.com/watch?v=tC3ad9q2PLg> (last visited Nov. 17, 2020).

23 ³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

1 how little time it took to begin drifting though as I have only had those joy-cons for
2 maybe 3-4 months, maybe longer. I am guessing that it is just due to me and my
3 brother using the switch regularly.”

4 60. Nintendo could easily disclose the defect to potential consumers in any number of
5 ways, including on the product’s packaging, in the user manual, on its website, or on its set-up
6 screen. It does not do so and instead conceals the defect from consumers.

7 61. Prior to the filing of this lawsuit, when a consumer experienced the defect and
8 contacted Nintendo, Nintendo routinely refused to offer any sort of fix free of charge.

9 62. Following the filing of this lawsuit, leaked documents revealed that Nintendo has
10 begun offering free repairs on Joy-Cons manifesting the defect. Consumers must mail their Joy-
11 Cons to Nintendo and are typically without their Joy-Con for approximately a week or longer.³⁸

12 63. There is no indication, however, that Nintendo has developed an actual fix for the
13 drift problem; rather, it appears to simply perform some sort of minor refurbishment and send
14 the Joy-Cons back to consumers still defective and susceptible to manifestation of the Drift
15 Defect in the future. Nor is there any indication that Nintendo is extending the warranty,
16 compensating consumers for various past expenses or damages, or notifying consumers about
17 their secret repair program.

18 64. Indeed, public complaints posted online already show several reports of consumers
19 experiencing drift again within a few days of receiving their Joy-Cons back from Nintendo.
20
21
22

23 ³⁸ https://www.vice.com/en_us/article/8xzzva/internal-nintendo-memo-instructs-customer-service-to-fix-joy-con-drift-for-free (last visited Nov. 17, 2020).

1 From Cesar, on 7/31/19³⁹

2 “I got my joycon back from repair today and guess what it started to drift ☺so see
3 you in court N*ntendo”

4 From epods, posted 8/3/19⁴⁰

5 “I sent my broken Joy-Con back to Nintendo and they sent me back a new pair. After
6 four hours of lightly playing hidden gem Celeste my new Joy-Con are now drifting
again! I cannot believe it!”

7 From Chris Butler, posted 8/2/19⁴¹

8 “@NintendoAmerica is this what you call a “fixed” joycon? I received the repair
9 yesterday, and this is the result. I’ve had the switch less than a year and I’ve had 3
repairs during that time. 2 joycons and 1 charge port. Not to mention had to buy a
replacement charge. Be better!”

10 From Lundinstrom, posted 8/19/19⁴²

11 “I’m so glad my left Joycon has drift again about a month after sending it in. Such
12 fun. So fun to be playing Smash/anything and get pulled to the left nonstop. I’m so
tired of Nintendo. A single Joycon is \$50.”

13 From Keybladedark12, on 8/10/19⁴³

14 “Sent in my left joy con for drift repair. Got it back “fixed”

15 Tough to see in the comment above, but a video is posted with this Tweet that shows
16 off the joy-con drift occurring on the supposedly fixed controller.

17 From Chelledogo, on 8/23/19⁴⁴

18 ³⁹ <https://twitter.com/PinkMoostache/status/1156762078474059776> (last visited Nov. 17,
2020).

19 ⁴⁰ https://www.reddit.com/r/tomorrow/comments/clak6l/can_confirm_joycon_are_still_drifting/
(last visit Nov. 17, 2020).

20 ⁴¹ <https://twitter.com/MadridistaChris/status/1157307553887531009> (last visited Nov. 17,
2020).

21 ⁴² <https://twitter.com/Lundinstrom/status/1163576025328037889> (last visited Nov. 17, 2020).

22 ⁴³ <https://twitter.com/keybladedark12/status/1160258856683024386> (last visited Nov. 17,
2020).

23 ⁴⁴ [https://www.reddit.com/r/NintendoSwitch/comments/cu71j9/left_joy_con_still_drifting
after_coming_back/](https://www.reddit.com/r/NintendoSwitch/comments/cu71j9/left_joy_con_still_drifting_after_coming_back/) (last visited Nov. 17, 2020).

1 “I sent out two left joycons to Nintendo to get them repaired for drift and recently
2 got them back. However, the left control stick is still drifting downward. Is there
3 something wrong with my system? The odd thing is I really only see it doing this on
the main menu, and it kind of does it on-and-off...”

4 From Sonni Boi, on 9/2/19⁴⁵

5 “For anyone who is experiencing #drift with your #Joycon for your #Switch and are
6 planning to send it for a repair, just an FYI:I sent mine in, and got it back last
Wednesday. They gave me brand new Joycons. Two days later, it was drifting again.
Hope @NintendoAmerica is aware”

7 From Kevin McNeil, on 9/5/19⁴⁶

8 “i sent my joycon into nintendo to get fixed, i got it back and it still has the same
9 problem, and they didnt return my zelda analog stick cover... anyone else deal with
that? what did you do?”

10 65. Some users also report being charged \$30 for the repair. Other users report having
11 to wait several weeks without their controllers with no update from Nintendo after sending them
12 in for repair.

13 66. Because of Nintendo’s actions, Switch owners have suffered damages in the form
14 of loss of use, failure of the Switches and Joy-Cons core functionality, loss of the benefit of their
15 bargain, diminution of value of and overpayment for their Switches, and lost time and expense
16 involved in contacting Nintendo and retailers about the problem and waiting for replacements
17 and/or repairs.

18 67. Nintendo knew of the joystick and control issues with the regular Switch and Joy-
19 Cons, yet it did not resolve this issue and included the same defective hardware into the Switch
20 Lite systems.

22 ⁴⁵ <https://twitter.com/SonofSoH/status/1168597438451658756> (last visited Nov. 17, 2020).

23 ⁴⁶ <https://www.facebook.com/groups/thenintendoswitch/permalink/2461321340599791/> (last
visited Nov. 17, 2020)

68. Based upon the allegations in this lawsuit and scores of internet complaints online prior to the release of the Switch Lite, and because Nintendo included the same joystick and controller technology and hardware in the Switch Lite, Nintendo cannot dispute that it had presale knowledge of the Drifting Defect in the Switch Lites.

CLASS ACTION ALLEGATIONS

69. This action is brought, and may properly proceed, as a class action, pursuant to Rule 23(a) and 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure. Plaintiff seeks certification of a Class defined as follows (“Nationwide Class”):

Nationwide Class:

All persons in the United States who bought a Nintendo Switch, stand-alone Joy-Con controllers, or a Nintendo Switch Lite and, at the time of purchase, were below the age of majority.

70. In addition, or in the alternative, Plaintiff seeks certification of the following subclasses (“State Subclasses”):

California Subclass:

All persons in the state of California who bought a Nintendo Switch, stand-alone Joy-Con controllers, or a Nintendo Switch Lite and, at the time of purchase, were below the age of majority.

71. Excluded from the Classes is Nintendo, its affiliates, employees, officers and directors, persons or entities that purchased Switches or Joy-Con controllers for resale, and the Judge(s) assigned to this case. Plaintiff reserves the right to modify, change, or expand the class definitions if discovery and/or further investigation reveal that they should be expanded or otherwise modified.

72. **Numerosity:** The Class is so numerous that joinder of all members is impracticable. While the exact number and identities of individual members of the Class is unknown at this time, such information being in the sole possession of Nintendo and obtainable

1 by Plaintiff only through the discovery process, Plaintiff believes, and on that basis allege, that
 2 at least hundreds of thousands of Switches and Joy-Con controllers have been sold nationwide.
 3 The Switch has sold 22.5 million units in the United States, and in October Nintendo revealed
 4 that more than 68 million units have been sold globally.⁴⁷

5 73. **Existence/Predominance of Common Questions of Fact and Law:** Common
 6 questions of law and fact exist as to all members of the Class. These questions predominate over
 7 the questions affecting individual Class members. These common legal and factual questions
 8 include, but are not limited to:

- 9 a. whether Nintendo engaged in the conduct alleged herein;
- 10 b. whether the Joy-Con controllers are defective;
- 11 c. whether Nintendo placed the Switch and Joy-Con controllers into the
 12 stream of commerce in the United States with knowledge of the defect;
- 13 d. whether Nintendo knew or should have known of the defect, and if so,
 14 how long it knew of this defect;
- 15 e. when Nintendo became aware of the defect;
- 16 f. whether Nintendo knowingly failed to disclose the existence and cause of
 17 the defect;
- 18 g. whether Nintendo's conduct alleged herein violates consumer protection
 19 statutes, false advertising laws, warranty laws, and other laws as asserted herein;

22 ⁴⁷ See [https://www.theverge.com/2020/11/12/21562530/nintendo-switch-lite-sales-october-](https://www.theverge.com/2020/11/12/21562530/nintendo-switch-lite-sales-october-2020/)
 23 [2020/](https://www.theverge.com/2020/11/12/21562530/nintendo-switch-lite-sales-october-2020/) (last visited Nov. 17, 2020).

1 h. whether Plaintiff and Class Members overpaid for their Switches and/or
2 Joy-Con controllers in light of the defect;

3 i. whether Plaintiff and Class Members have suffered an ascertainable loss
4 as a result of the loss of their Switch's functionality;

5 j. whether Plaintiff and Class Members are entitled to damages, including
6 punitive damages, as a result of Nintendo's conduct alleged herein, and if so, the amount or
7 proper measure of those damages; and

8 k. whether Plaintiff and Class Members are entitled to equitable relief,
9 including but not limited to restitution and/or injunctive relief, including public injunctive relief
10 as provided for under California law and other state laws asserted herein.

11 74. **Typicality**: Plaintiff's claims are typical of the claims of the Class since Plaintiff
12 purchased a Switch and/or Joy-Con controllers, as did each member of the Class. Plaintiff and
13 Class members were injured in the same manner by Nintendo's uniform course of conduct
14 alleged herein. Plaintiff and all Class members have the same claims against Nintendo relating
15 to the conduct alleged herein, and the same events giving rise to Plaintiff's claims for relief are
16 identical to those giving rise to the claims of all Class Members. Plaintiff and all Class members
17 sustained monetary and economic injuries including, but not limited to, ascertainable losses
18 arising out of Nintendo's wrongful conduct in selling and failing to remedy defective Joy-Con
19 controllers. Plaintiff is advancing the same claims and legal theories on behalf of himself and all
20 absent Class Members.

21 75. **Adequacy**: Plaintiff is an adequate representative for the Class because his
22 interests do not conflict with the interests of the Class that he seeks to represent. Plaintiff has
23 retained counsel competent and highly experienced in complex class action litigation—including

1 consumer fraud class action cases—and they intend to prosecute this action vigorously. The
2 interests of the Class will be fairly and adequately protected by Plaintiff and his counsel.

3 76. **Superiority**: A class action is superior to all other available means of fair and
4 efficient adjudication of the claims of Plaintiff and members of the Class. The injury suffered
5 by each individual Class member is relatively small in comparison to the burden and expense of
6 individual prosecution of the complex and extensive litigation necessitated by Nintendo's
7 conduct. It would be virtually impossible for members of the Class individually to redress
8 effectively the wrongs done to them by Nintendo. Even if Class members could afford such
9 individual litigation, the court system could not. Individualized litigation presents a potential for
10 inconsistent or contradictory judgments. Individualized litigation increases the delay and expense
11 to all parties, and to the court system, presented by the complex legal and factual issues of the
12 case. By contrast, the class action device presents far fewer management difficulties, and
13 provides the benefits of single adjudication, an economy of scale, and comprehensive supervision
14 by a single court. Upon information and belief, members of the Class can be readily identified
15 and notified.

16 77. Nintendo has acted, and refuses to act, on grounds generally applicable to the
17 Class, thereby making appropriate final equitable and injunctive relief with respect to the Class
18 as a whole.

19 **PUBLIC INJUNCTIVE RELIEF**

20 78. Plaintiff seeks an injunction on behalf of himself, the putative class, and the general
21 public, prohibiting Nintendo from making material omissions and misrepresentations to the
22 public as to the nature of its Switch. Plaintiff seeks a public injunction requiring Nintendo to
23 notify all Switch and Switch Lite owners, and the public at large, about the Drift Defect, setting

1 forth a description of the Drift Defect in the Joy-Con controllers and that the Joy-Con controllers
2 do not perform as marketed.

3 79. Along with Plaintiff's prayers for monetary relief, the injunctive relief sought is
4 essential to stopping Nintendo's continuing deceptive scheme. In the absence of an injunction,
5 Nintendo will remain free to continue to mislead members of the public regarding the Drift
6 Defect, causing consumers to believe Nintendo's material misrepresentations and omissions
7 concerning the function and reliability of the Joy-Con controllers.

8 80. Nintendo lures consumers into purchasing the Switch by touting the Joy-Con
9 controllers as amazing controllers that combine all gameplay innovations that Nintendo invented,
10 and adds to it. Nintendo does not disclose to consumers that the Joy-Con controllers are defective,
11 causing the joystick component to fail. Members of the general public have the right to know the
12 latent defects with the Joy-Con controller components.

13 81. The injunctive relief sought by Plaintiff will protect the public from Nintendo's
14 deceitful marketing practices which misrepresent and omit material facts. Plaintiff seeks to enjoin
15 Nintendo from misrepresenting the features of its Switch and Joy-Con controllers to the public.

16 **CLAIMS FOR RELIEF**

17 **COUNT I** 18 **VIOLATIONS OF THE CALIFORNIA** 19 **CONSUMER LEGAL REMEDIES ACT** **(CAL. CIV. CODE §§ 1750, *et seq.*) ("CLRA")** **(On behalf of the California Subclass)**

20 82. Plaintiff incorporates by reference each preceding and succeeding paragraph as
21 though fully set forth at length herein.

22 83. Nintendo is a "person" as that term is defined in CAL. CIV. CODE § 1761(c).
23

1 84. Plaintiff and members of the California Subclass are “consumers” as that term is
2 defined in CAL. CIV. CODE §1761(d).

3 85. Nintendo engaged in unfair and deceptive acts in violation of the CLRA by the
4 practices described above, and by knowingly and intentionally concealing from Plaintiff and the
5 California Subclass members that the Switches and Joy-Con controllers suffer from the Drift
6 Defect. These acts and practices violate, at a minimum, the following CLRA sections:

7 (a)(5) Representing that goods or services have sponsorships,
8 characteristics, uses, benefits or quantities which they do not
have;

9 (a)(7) Representing that goods or services are of a particular
10 standard, quality, or grade, or that goods are of a particular style
or model, if they are of another; and

11 (a)(9) Advertising goods and services with the intent not to sell
12 them as advertised.

13 86. Nintendo’s unfair or deceptive acts or practices occurred repeatedly in its trade or
14 business, and were capable of deceiving a substantial portion of the purchasing public.

15 87. Nintendo knew that the Switches and Joy-Con controllers were defective, would
16 fail prematurely, and were not suitable for their intended use.

17 88. Nintendo was under a duty to Plaintiff and the California Subclass members to
18 disclose the defective nature of the devices because:

19 a. Nintendo was in a superior position to know the true state of facts about the
20 defect;

21 b. Plaintiff and the California Subclass members could not reasonably have
22 been expected to learn or discover that the devices had a defect at the time
23 of purchase; and

1 c. Nintendo knew that Plaintiff and the California Subclass members could not
2 reasonably have been expected to learn or discover the defect and the
3 associated costs until the manifestation of the defect.

4 89. In failing to disclose the Drift Defect and the associated costs and harm that result
5 from it, Nintendo has knowingly and intentionally concealed material facts and breached its duty
6 to disclose this material information.

7 90. The facts concealed or not disclosed by Nintendo to Plaintiff and the California
8 Subclass members are material in that a reasonable consumer would have considered them to be
9 important in deciding whether to purchase the devices or pay a lesser price. Had Plaintiff and the
10 California Subclass known about the defective nature of the Switches and Joy-Con controllers,
11 they would not have purchased them or would have paid less for them than they did.

12 91. As a direct and proximate result of Nintendo's conduct, Plaintiff and California
13 Subclass Members have been harmed, including, but not limited to: (1) paying more for the
14 Switch or Joy-Cons than they were worth and more than Plaintiff and Class Members would have
15 had they known of the defect, (2) paying out of pocket attempting to repair the defect and/or for
16 replacement controllers; and (3) lost time addressing the defect.

17 92. Nintendo's violations present a continuing risk to Plaintiff and members of the
18 California Class, and the California general public. Defendant's unlawful acts and practices
19 complained of herein affect the public interest and are likely to be repeated. Injunctive relief by
20 and large would benefit the general public here. Injunctive relief benefits Plaintiff only
21 incidentally as members of the general public, because Plaintiff has already been injured by and
22 is therefore aware of the alleged misconduct of Nintendo.
23

93. Plaintiff sent a CLRA notice to Nintendo on November 17, 2020 providing the notice required by CAL. CIV. CODE § 1782(a).

94. Plaintiff further seeks an order awarding costs of court and attorneys' fees pursuant to CAL. CIV. CODE § 1780(e).

COUNT II
VIOLATIONS OF THE CALIFORNIA UNFAIR COMPETITION LAW
(CAL. BUS. & PROF. CODE, *et seq.* §§ 17200) ("UCL")
(On behalf of Plaintiff and the California Subclass)

95. Plaintiff incorporates the above allegations by reference.

96. The UCL proscribes acts of unfair competition, including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." CAL. BUS. & PROF. CODE § 17200. As set forth below, Nintendo has violated all three prongs of the statute.

Unlawful

97. Nintendo's conduct is unlawful, in violation of the UCL, because its conduct contravenes the legislatively declared policy against unfair methods of business competition. Additionally Nintendo's conduct is unlawful because, as set forth herein, it violates the California Consumer Legal Remedies Act, the Song-Beverly Warranty Act, various other state statutes asserted herein, and constitutes breach of express and implied warranties, and fraudulent concealment.

Unfair

98. Nintendo's conduct is unfair in violation of the UCL, because it violates California public policy, legislatively declared in the Song-Beverly Consumer Warranty Act, requiring a manufacturer—defined as a person or entity that "manufactures, assembles, or produces

1 consumer goods”⁴⁸—to ensure that goods it places on the market are fit for their ordinary and
 2 intended purposes.

3 99. Nintendo acted in an unethical, unscrupulous, outrageous, oppressive, and
 4 substantially injurious manner, including as follows:

- 5 • Nintendo promoted and sold Switches, Joy-Cons, and Switch Lites that it knew
 6 were defective, possess the drifting issue, and fail prematurely;
- 7 • Nintendo failed to disclose that the Switches, Joy-Cons, and Switch Lites are
 8 defective, and represented through advertising, product packaging, press releases,
 9 and other sources that they possessed particular qualities that were inconsistent
 10 with its internal knowledge;
- 11 • Nintendo made repairs or gave replacements that were ineffective to remove the
 12 Drifting Defect, exposing consumers to repeated instances of failure and
 13 rendering its warranty useless;
- 14 • Nintendo failed to exercise adequate quality control and due diligence over the
 15 Switches, Joy-Cons, and Switch Lites before launch; and
- 16 • Nintendo minimized the scope and severity of the problems with the Switches,
 17 Joy-Cons, and Switch Lites, refusing to acknowledge that their keyboards are
 18 defective (while, at the same time, clandestinely waiving the temporal limitations
 19 in its warranty for individuals who experience drifting), failing to provide
 20 adequate relief to consumers.

21
 22
 23

⁴⁸ CAL. CIV. CODE § 1791(j).

100. The gravity of harm resulting from Nintendo's unfair conduct outweighs any potential utility. The practice of selling defective Switches, Switch Lites, and Joy-Cons without providing an adequate remedy to cure the defect—and continuing to sell them without full and fair disclosure of the defect—harms the public at large and is part of a common and uniform course of wrongful conduct.

101. The harm from Nintendo's conduct was not reasonably avoidable by consumers because the Switches, Switch Lites, and Joy-Cons suffer from a defect, and Nintendo did not disclose the defect, even after receiving a large volume of consumer complaints. Plaintiff did not know of, and had no reasonable means of discovering Switches, Switch Lites, and Joy-Cons are defective.

102. There were reasonably available alternatives that would further Nintendo's business interests of satisfying and retaining their customers while maintaining profitability, such as: (1) allowing adequate development time to analyze the results of pre-release testing and implementing corrective measures, including before launching the Switch Lite; (2) acknowledging the defect and providing a permanent fix for defective joysticks and controls; (3) disclosing the defect to prospective purchasers; and (4) offering refunds or suitable non-defective replacement devices to consumers whose Switches, Switch Lites, and Joy-Cons have failed.

Fraud by Omission

103. Nintendo's conduct is fraudulent in violation of the UCL because it is likely to deceive a reasonable consumer:

- Nintendo knowingly and intentionally concealed from consumers that the Switches, Switch Lites, and Joy-Cons contain a latent defect that renders them prone to drifting and failure.

- 1 • Nintendo volunteered information to consumers through advertising and through
2 other means that the Switches, Switch Lites, and Joy-Cons were functional,
3 premium gaming devices without disclosing information that would have
4 materially qualified these partial representations.
- 5 • Nintendo promoted the high-quality and premium features of the Switches,
6 Switch Lites, and Joy-Cons, despite knowing they are defective and failed to
7 correct the misleading partial disclosures.

8 104. Nintendo had ample means and opportunities to alert Plaintiff and similarly
9 situated consumers to the fact that the Switches, Switch Lites, and Joy-Cons are defective,
10 including on its website; in advertisements for the Switches, Joy-Cons, and Switch Lites; on
11 external product packaging; in user and warranty manuals; and as part of the standardized
12 Switch/Switch Lite set-up process. But Nintendo failed to disclose the defect altogether. Had
13 Nintendo disclosed the defect, Plaintiff and Class members would not have purchased their
14 Switches, Switch Lites, and Joy-Cons, or would not have purchased them at the prices they did.

15 105. Nintendo was under a duty to disclose the defect given its exclusive knowledge of
16 the Drift Defect because it actively concealed the defect from consumers, and because it made
17 partial representations about the Switches, Switch Lites, and Joy-Cons without also disclosing
18 the latent defect.

19 106. Plaintiff suffered injury in fact, including lost money or property, as a result of
20 Nintendo's unlawful, unfair and fraudulent acts. Absent Nintendo's unlawful, unfair, and
21 fraudulent conduct, Plaintiff and Class members would not have purchased their Switches,
22 Switch Lites, and Joy-Cons, or would not have purchased them at the prices they did.

1 107. Through its unlawful, unfair, and fraudulent conduct, Nintendo acquired money
2 that Plaintiff and Class members once had an ownership interest in. Nintendo acquired money
3 from them insofar as they purchased their Switches, Switch Lites, and Joy-Cons directly from
4 Nintendo or through its retailers (e.g., Wal-Mart, GameStop, Best Buy, Amazon, Target).

5 108. Nintendo's wrongful acts will continue unless restrained and enjoined by order of
6 this Court. Plaintiff seeks to enjoin further unlawful, unfair, and/or fraudulent acts or practices
7 by Defendant under CAL. BUS. & PROF. CODE § 17200. Plaintiff and the proposed California
8 Class are entitled to an injunction and other equitable relief, including restitutionary
9 disgorgement of all profits accruing to Nintendo, because of Nintendo's ongoing unfair and
10 deceptive practices, and such other orders as may be necessary to prevent Nintendo's future
11 violations of the UCL. Pursuant to CAL. BUS. & PROF. CODE §§ 17203, Plaintiff and the
12 California Class are entitled to (i) an order on behalf of the general public of the State of
13 California enjoining Nintendo from committing violations of the UCL; (ii) requiring Nintendo
14 to immediately cease the sale of the Switch with the Defect; (iii) requiring Nintendo to give
15 individualized notice to all consumers who purchased the Switch, Switch Lite or Joy-Con
16 controllers in the State of California during the applicable limitations periods and the public at
17 large of the existence of the Defect; (iv) requiring Nintendo to give individualized notice to all
18 consumers who purchased a Switch, Switch Lite or Joy-Con controllers in the State of California
19 within the applicable limitations periods of their rights under the UCL and applicable California
20 law; (v) requiring Nintendo to repair or replace Class members' Switches and/or Joy-Con
21 controllers with non-defective Switches/Joy-Con controllers; and (vi) establishing an effective
22 monitoring mechanism to ensure Nintendo's continued compliance with the terms of the
23

1 injunction. To the extent any of these remedies are equitable, Plaintiff and the California Class
2 seek them in the alternative to any adequate remedy at law they may have.

3
4 **COUNT III**

5 **Violations of the Washington Consumer Protection Act**
6 **WASH. REV. CODE §§ 19.86.010, *et seq.* (“WCPA”)**
7 **(On Behalf of the Nationwide Class)**

8 109. Plaintiff incorporates the above allegations by reference.

9 110. Plaintiff asserts this claim on behalf of herself and the Nationwide Class.

10 111. Nintendo, Plaintiff and Class members are “persons” under WASH. REV. CODE
11 § 19.86.010(1).

12 112. Nintendo’s acts or practices, as set forth above, occurred in the conduct of “trade”
13 or “commerce” within the meaning of WASH. REV. CODE § 19.86.010(2).

14 113. Washington law prohibits “[u]nfair methods of competition and unfair or
15 deceptive acts or practices in the conduct of any trade or practices.” WASH. REV. CODE
16 § 19.86.020.

17 114. Nintendo’s acts and practices, described herein, are unfair in violation of
18 Washington law for the reasons already stated.

19 115. By selling defective Nintendo Switch and Joy-Cons plagued by the Drift Defect,
20 with exclusive knowledge of the defect, and by failing to disclose the defect in good faith,
21 Nintendo acted unscrupulously in a manner that is substantially oppressive and injurious to
22 consumers.

23 116. Nintendo engaged in deceptive trade practices in violation of Washington law by
willfully failing to disclose and actively concealing the defective nature of the Joy-Cons.

1 117. Nintendo committed deceptive acts and practices with the intent that consumers,
2 such as Plaintiff and Class members, would rely upon Nintendo's representations and/or
3 omissions when deciding whether to purchase a Switch and/or additional Joy-Cons.

4 118. Plaintiff and Class members suffered ascertainable loss as a direct and proximate
5 result of Nintendo's unfair and deceptive acts or practices. Had Plaintiff and Class members
6 known that the Joy-Cons were defective, they would not have purchased a Switch console or
7 separate sets of Joy-Cons, or would have paid significantly less for them. Among other injuries,
8 Plaintiff and Class members overpaid for their Switch and Joy-Cons, which suffered a
9 diminution in value.

10 119. Nintendo's violations of the WCPA present a continuing risk to Plaintiff and Class
11 members, as well as to the general public. Nintendo's unlawful acts and practices adversely
12 affect the public interest.

13 120. Under WASH. REV. CODE § 19.86.090, Plaintiff and the Class seek an order
14 enjoining Nintendo's unfair and deceptive acts or practices, providing for appropriate monetary
15 relief, including trebled damages, and awarding reasonable attorneys' fees and costs.

16 121. In accordance with WASH. REV. CODE § 19.86.095, a copy of this Complaint is
17 being served on the Attorney General of Washington.

18 **COUNT IV**
19 **UNJUST ENRICHMENT**
(On Behalf of the Nationwide Class)

20 122. Plaintiff incorporates by reference each preceding and succeeding paragraph as
21 though fully set forth at length herein.

22 123. This claim is pleaded in the alternative to the other warranty-based claims set forth
23 herein.

1 124. As the intended and expected result of its conscious wrongdoing, Nintendo has
2 profited and benefited from the purchase of Switches or Joy-Con controllers with the defect.

3 125. Nintendo has voluntarily accepted and retained these profits and benefits, with full
4 knowledge and awareness that, as a result of Nintendo's misconduct alleged herein, Plaintiff and
5 the Class were not receiving devices of the quality, nature, fitness, or value that had been
6 represented by Nintendo, and that a reasonable consumer would expect. Specifically, Plaintiff
7 and the Class members expected that when they purchased their devices, they would not be
8 equipped with a defective joystick that would interfere with gameplay.

9 126. Nintendo has been unjustly enriched by its fraudulent, deceptive, unlawful, and
10 unfair conduct, and its withholding of benefits and unearned monies from Plaintiff and the Class,
11 at the expense of these parties.

12 127. Equity and good conscience militate against permitting Nintendo to retain these
13 profits and benefits.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff, on behalf of himself and all others similarly situated, hereby
16 request that this Court enter an Order against Nintendo providing the following:

17 A. Certification of the proposed Class and/or Subclass, appointment of Plaintiff and
18 their counsel to represent the proposed Class, and notice to the proposed Class to be paid for by
19 Nintendo;

20 B. An order temporarily and permanently enjoining Nintendo from continuing the
21 unlawful, deceptive, fraudulent, and unfair business practices alleged in this Complaint;

22 C. Public injunctive relief in the form of a recall or free replacement program and
23 notice of same to all class members;

D. Equitable relief in the form of buyback of the devices;

E. Costs, restitution, damages, including punitive damages, treble damages, penalties, and disgorgement in an amount to be determined at trial;

F. An Order requiring Nintendo to pay both pre- and post-judgment interest on any amounts awarded;

G. An award of costs and attorneys' fees; and

H. Such other or further relief as may be appropriate.

JURY DEMAND

Plaintiff hereby demands a trial by jury for all claims so triable.

DATED this 17th day of November, 2020.

TOUSLEY BRAIN STEPHENS PLLC

By: s/ Kim D. Stephens

Kim D. Stephens, WSBA #11984

By: s/ Jason T. Dennett

Jason T. Dennett, WSBA #30686

By: s/ Kaleigh N.B. Powell

Kaleigh N.B. Powell, WSBA #52684

1700 Seventh Avenue, Suite 2200

Seattle, Washington 98101

Telephone: 206.682.5600/Fax: 206.682.2992

Email: kstephens@tousley.com

jdennett@tousley.com

kpowell@tousley.com

Benjamin F. Johns (*pro hac vice to be filed*)

Samantha E. Holbrook (*pro hac vice to be filed*)

Andrew W. Ferich (*pro hac vice to be filed*)

Alex M. Kashurba (*pro hac vice to be filed*)

CHIMICLES SCHWARTZ KRINER

& DONALDSON-SMITH LLP

361 W. Lancaster Avenue

Haverford, Pennsylvania 19041

Telephone: (610) 642-8500

Email: bfj@chimicles.com
seh@chimicles.com
awf@chimicles.com
amk@chimicles.com

Counsel for Plaintiff and the Putative Class

4817-1944-8274, v. 1